# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 15, 2002 |
| v | No. 232166<br>Kalamazoo Circuit Court |
| OLEGARIO REYES CAMPOS,<br><br>Defendant-Appellant. | LC No. 00-000880-FC |

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(a), two counts of second-degree criminal sexual conduct ("CSC II"), MCL 750.520c(1)(a), one count of child sexually abusive activity, MCL 750.145c(2), and one count of possession of child sexually abusive material, MCL 750.145c(4). Defendant was sentenced to concurrent terms of fifteen to thirty years' imprisonment for the CSC I convictions, six to fifteen years' imprisonment for the CSC II convictions, eight to twenty years' imprisonment for the child sexually abusive activity conviction, and one year in jail for the possession of child sexually abusive material conviction. Defendant appeals as of right. We affirm.

After being alerted by an anonymous source of possible sexual abuse of a young girl occurring at defendant's residence, the police investigated and subsequently executed a search warrant there and seized a videotape which depicted defendant and a young girl engaged in sexual acts. Defendant sought to suppress this evidence, arguing that the affidavit underlying the search warrant failed to comply with MCL 780.653. The court denied defendant's motion on this ground. Defendant raises the same argument on appeal, contending that the court erred in denying his motion. We disagree.

Appellate review of a magistrate's probable cause determination regarding a search warrant and the underlying affidavit requires this Court to ask "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). Affording due deference to the magistrate's conclusion, this Court must simply ensure that "there is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Id.*, quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Furthermore, the search

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

warrant and the underlying affidavit are to be read in a commonsense and realistic manner. *Russo, supra* at 604. The totality of circumstances should be considered in determining probable cause. *Id*. at 609.

MCL 780.653 states, in pertinent part,

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
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> * * *
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> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Personal knowledge should be determined from the information provided and may be inferred from the stated facts. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). Here, although the wording of the affidavit is somewhat awkward, we believe that the magistrate could have reasonably concluded that the unnamed person spoke from personal knowledge.

We acknowledge that the affidavit literally states that defendant was "just seen fondling a young girl's vaginal region," without specifying that it was the unnamed person who saw the act. However, when the paragraph is read in its entirety in a realistic and commonsense manner, paragraph b of the affidavit indicates that the unnamed person went to the police station in person and reported a crime that he or she had just witnessed. The unnamed person identified the offender as "Ole," who lived at 3122 Virginia, the location of the offense. The offense was viewed through an uncovered window.

In regards to the reliability of the information, the police confirmed that a person named "Ole" did in fact live at 3122 Virginia. The unnamed person, upon returning in person thirty minutes later, informed the police that "sexual contact with the young girl had been videotaped." The police also confirmed that the unnamed person was "in [a] position to make the reported observation," as a result of statements made by defendant. The affiant officer is presumably reliable. *People v Powell*, 201 Mich App 516; 506 NW2d 894 (1993). While the affidavit could have been less conclusory by delineating defendant's statements, this was not the only information indicating reliability and therefore not fatal to a finding of probable cause. Defendant also admitted that he owned pornographic videotapes and a video recorder.

Reading the affidavit as a whole, we conclude that it contained allegations from which the magistrate could conclude that the unnamed person referred to in the affidavit spoke from personal knowledge and that the information provided was reliable. Therefore, the magistrate did not err in finding that probable cause existed to support the search warrant, and, thus, the circuit court did not err in denying this portion of defendant's motion to suppress.

Defendant also argues that the court erred in not responding to an objection he made at sentencing regarding the inclusion of the probation agent's opinion in the presentence investigation report and considering the opinion in sentencing. The probation agent stated, "He [defendant] attempted to divert the blame to the victim, indicating that she approached him." However, the sentencing court did respond to defendant's objection. It stated:

> I am going to let that sentence stand as presented. I recognize that using the phrase, he attempted to divert the blame to the victim, does include within it an opinion or an analysis of what one is hearing. But I also conclude that, that is appropriate on a pre-sentence report, but I recognize that, that is what it is.

Defendant contends that the probations agent's characterization is incorrect because the defense psychologist determined that defendant accepted responsibility. "[A] sentence is not invalid because probation agents and a defendant's psychologists use undisputed facts to draw conflicting conclusions about the defendant's character." *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997). Furthermore, the sentencing court need not resolve such an alleged inaccuracy because the objection is not to a factual inaccuracy, but rather to a conclusion. *Id*. It is undisputed that defendant made statements indicating that the victim approached him first and was the aggressor. Therefore, we conclude that no error occurred when the sentencing court decided to leave the sentence in the report, having been alerted to the dispute, because it was a conclusion based on undisputed facts.

Defendant further argues, regarding his CSC I convictions, that the sentencing court misscored two offense variables and his sentence was disproportionate.[1] Appellate review of sentences imposed under the judicial guidelines is limited to whether the sentencing court abused its discretion, i.e., whether the sentence is disproportionate.[2] *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997). Appellate courts are precluded from scoring or rescoring offense and prior record variables in order to determine if they were correctly applied. *Id.* "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual basis is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.* at 177.

Defendant asserts that there was no factual basis for the scores of Offense Variable [OV] 6 and OV 12. We do not address this portion of defendant's argument because we find that defendant's sentence was proportionate. Defendant's sentence was within the guidelines, at the lower end of the sentencing range. Sentences within the guidelines range are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Nevertheless, such sentences can violate the principle of proportionality in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant's employment and lack of criminal history are not unusual circumstances which overcome the presumption. *People v*

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[1] Because defendant was convicted of multiple offenses, only his convictions for CSC I, which carried the longest possible sentence, were scored. Therefore, our review is limited to the sentence imposed for the CSC I convictions.

[2] The parties stipulated that the offenses which were depicted on the videotape occurred in the spring and summer of 1998.

*Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Age may be a mitigating factor, but its consideration should be limited. *People v Fleming*, 428 Mich 408, 423-424 n 17; 410 NW2d 266 (1987).

We find no such unusual circumstances in this case. We recognize that given defendant's age and health status his sentence may amount to a life sentence. However, given the egregious nature of the offense, the mitigating factors defendant presents simply do not warrant a departure. Therefore, the court did not abuse its discretion when it sentenced defendant to fifteen to thirty years' imprisonment for his CSC I convictions.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof